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UNITED STATES BANKRUPTCY COURT

10 EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

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In re

STEVE HENRY RAMOS,
Debtor(s).

Case No. 10-11703-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

WELLS FARGO BANK, NA,

LBR 4001-1 and 9014-1(f)(1)

Movant,

DATE: June 8, 2010
TIME: 1:30 p.m.
CTRM: 11

vs.

2500 Tulare Street,
Fresno, CA 93721-1318

STEVE HENRY RAMOS, Debtor(s);
ROBERT A. HAWKINS, Chapter 7 Trustee,
Respondents.

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1 Wells Fargo Bank, NA¹ ("Movant"), moves this court for an order terminating the automatic stay of
2 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to
3 enforce its security interest in real property generally described as 3916 Countryside Lane, Friant,
4 California 93626.

5 On or about February 21, 2010, Steve Henry Ramos ("Debtor") filed a voluntary petition
6 under Chapter 7 of the Bankruptcy Code, and Robert A. Hawkins was appointed as Chapter 7
7 Trustee. As a result of said filing, certain acts and proceedings against Debtor and the bankruptcy
8 estate are stayed as provided in 11 U.S.C. § 362.

9 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I.**

12 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).

13 **NO EQUITY**

14 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
15 debtor does not have any equity in the property and the property is not necessary to the debtor's
16 effective reorganization.

17 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:

18 § 362(d)(2) reflects congressional intent to allow creditors to
immediately proceed against the property where the debtor has no
19 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

20 Id. at 610 (emphasis added).

21 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
22 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
23 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
24 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th
25 Cir. 1984).

26 _____
27 ¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to
receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004,
28 notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize
Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act
as its agent for purposes of service under Fed. R. Bankr. P. 7004

1 An appropriate cost of sale factor should also be added to determine if the debtor has any
2 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
3 (Bankr. S.D. Cal. 1982).

4 On or about January 23, 2004, Debtor, for valuable consideration, made, executed and
5 delivered to American Brokers Conduit ("Lender") a Note in the principal sum of \$249,500.00 (the
6 "Note"). Pursuant to the Note, Debtor is obligated to make monthly principal and interest payments
7 commencing March 1, 2004, and continuing until February 1, 2034, when all outstanding amounts
8 are due and payable. The Note provides that, in the event of default, the holder of the Note has the
9 option of declaring all unpaid sums immediately due and payable. A true and correct copy of the
10 Note is attached to the concurrently served and filed Exhibits to the Declaration in Support of
11 Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and incorporated herein by
12 reference.

13 On or about January 23, 2004, the Debtor made, executed and delivered to Lender a Deed of
14 Trust (the "Deed of Trust") granting Lender a security interest in real property commonly described
15 as 3916 Countryside Lane, Friant, California 93626 (the "Real Property"), which is more fully
16 described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as
17 a result of the Debtor's bankruptcy case may be included in the outstanding balance under the Note.
18 The Deed of Trust was recorded on January 29, 2004, in the Official Records of Fresno County,
19 State of California. A true and correct copy of the Deed of Trust is attached to the Exhibits as
20 exhibit B and incorporated herein by reference.

21 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and
22 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
23 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
24 and incorporated herein by reference.

25 The obligation under the Note is in default as of January 1, 2010, for failure to make
26 payments to Movant. As of March 23, 2010, the total obligation due and owing under the Note is in
27 the approximate amount of \$227,069.73, representing the principal balance of \$226,191.51, interest
28 in the sum of \$2,759.10 and other fees due in the amount of \$45.00, less an escrow balance in the

1 amount of \$1,925.98. This is an approximate amount for purposes of this Motion only, and should
2 not be relied upon as such to pay off the subject loan as interest and additional advances may come
3 due subsequent to the filing of the Motion. An exact payoff amount can be obtained by contacting
4 Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees and costs in
5 bringing the instant Motion. Moreover, the total arrears under the Note are in the approximate sum
6 of \$5,397.42, excluding the post-petition attorneys' fees and costs incurred in filing the instant
7 Motion.

II.

RELIEF FROM STAY

LACK OF EQUITY

11 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
12 Statements, the fair market value of the Property is approximately \$300,000.00. True and correct
13 copies of the Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
14 exhibit D and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$300,000.00
Less:	
Movant's Trust Deed	\$227,069.73
Bank of the West – 2 nd Deed of Trust	\$96,564.00
Costs of Sale (8%)	<u>\$24,000.00</u>
Equity in the Property:	\$<47,633.73>

As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

III.

MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

1 Movant submits that adequate protection in this case requires normal and periodic cash
2 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
3 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

4 Movant is informed and believes that Debtor is presently unwilling or unable to provide
5 adequate protection to the Movant and there is no probability that adequate protection can be
6 afforded to Movant within a reasonable time.

7 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
8 § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

9 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

10 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
11 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

12 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

13 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
14 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
15 the Property;

16 4. Permitting Movant to offer and provide Debtor with information re: a potential
17 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
18 Mitigation Agreement, and to enter into such agreement with Debtor;

19 5. Alternatively, in the event this court declines to grant Movant the relief requested
20 above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to
21 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
22 and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay
23 when due (a) the monthly installments of principal and interest, as required under the Note;
24 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to
25 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
26 filing of this motion;

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28 /./.

1 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
2 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
3 and

4 7. For such other and further relief as the court deems just and proper.

5 | Dated: May 7, 2010

PITE DUNCAN, LLP

/s/ Joseph C Delmotte CA SBN 259460
JOSEPH C DELMOTTE
Attorneys for WELLS FARGO BANK, NA